Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1614

SCHOOL DISTRICT OF PITTSBURGH,
Appellant,

v

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF EDUCATION,
Appellee,

and

JOSEPH SCOTT and HELEN SCOTT, His Wife, ALPHONSE GREPPI and GLORIA GREPPI, His Wife, PATRICK MAIETTA and KATHY MAIETTA, His Wife, DAVID SLAIN and BETTY SLAIN, His Wife, BERNARD CONNOR and JOANNE CONNOR, His Wife, ANGELO BORELLI and PATRICIA BORELLI, His Wife, and PAUL DONGILLI and PATRICIA DONGILLI, His Wife,
Intervenor-Appellees.

On Appeal From the Supreme Court of Pennsylvania.

MOTION TO DISMISS OR AFFIRM.

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MOTION TO DISMISS OR AFFIRM.

Pursuant to Rule 16 of the Rules of this Court, Intervenor-appellees move to dismiss this appeal, or in the alternative to affirm the judgment below, on the ground that it presents no substantial federal question warranting plenary review by this Court.

QUESTION PRESENTED.

The Pennsylvania General Assembly has enacted a statute which provides for the expenditure of tax-raised funds to pay for the free transportation of public and non-public school pupils to and from the schools they lawfully attend. This litigation poses a single question:

> The Commonwealth having enacted such a statute for the general public welfare, does the Establishment Clause require the Commonwealth to exclude from the benefits of that statute those children—and only those children—who require transportation to religiously affiliated schools?

COUNTERSTATEMENT OF THE CASE.

The Commonwealth of Pennsylvania, through Section 1361 of its School Code, 13 P. S. § 13-1361, has adopted a statewide policy of providing free transportation for Pennsylvania children to and from the schools in which they are lawfully enrolled. Section 1361 reflects the policy of the Commonwealth that the transportation afforded be "identical" as between those children attending nonpublic schools and those children attending public schools.

Pennsylvania's first school transportation statute was enacted in 1911. Act of May 18, 1911, P. L. 309, § 1404. Since that time transportation services to Pennsylvania children have been gradually augmented in the interests of the "health, welfare and safety of the children of the Commonwealth." Act of June 15, 1965, No. 91, P. L. 133. While nonpublic school children had not been included as beneficiaries under earlier enactments, in 1965 the General Assembly broadened its legislation to include transportation services to such children along established public school bus routes. That statute was challenged as violating the Establishment Clause. The Supreme Court of Pennsylvania rejected that challenge. *Rhoades v. School District of Abington Township,* 424 Pa. 202 (1967). The plaintiffs therein appealed to the Supreme Court of the United States. This Court both dismissed the appeal, 389 U. S. 11 (1967), and denied a petition for certiorari in the companion case, *Worrell v. Matters,* 389 U. S. 46 (1967).

Experience with the 1965 enactment showed that—due to the irregularity of contours of public school districts and the fact that the areas within which parents find nonpublic schools for their children do not conform to those contours—the purpose of such a law ("to help parents get their children . . . safely and expeditiously to and from accredited schools", *Everson v. Board of Education,* 330 U. S. 1, 18 (1947)) was not being achieved. Many children attending nonpublic schools were excluded from enjoyment of a constitutionally valid public welfare benefit—not because they attended religious or other nonpublic schools—but solely by reason of the accident of the location of a particular school in relation to a public school district boundary line. In 1972 the General Assembly amended Section 1361 in order to remove the

absolute confinement of transportation of *public and nonpublic* school children to the geographical area of the public school district wherein the child resides. A tolerance of ten miles outside-the-district travel was written into the law.*

Appellant, since the enactment of Act 372 in 1972, has refused to comply with its provisions insofar as it provides for the transportation of nonpublic school children whose homes are in the school district but whose schools of lawful attendance lie beyond the school district boundary line. These have numbered between 2,000 and 3,000 children in each of the past six years. (See figure of 2,279 for the school year 1974, in Jurisdictional Statement, 8). The Secretary of Education, following hearing, ordered appellant to comply with the mandate of the Act by providing transportation to resident children attending nonpublic schools located within ten miles of the district boundary. Appellant sought review in the Commonwealth Court of Pennsylvania, which, on February 10, 1978, affirmed the order of the Secretary of Education. Appellant thereafter appealed to the Supreme Court of Pennsylvania. On January 24, 1979, that court affirmed the decision of the Commonwealth Court. *Springfield School District, et al. v. Commonwealth of Pennsylvania, Dept. of Education, et al.,* — Pa. —, 397 A. 2d 1154 (1979). On February 22, 1979, the appellant appealed to the Supreme Court of the United States.

* Attendance by public school students at public schools beyond the boundaries of the school district of residence has long been allowed by statute in Pennsylvania. See 24 P. S. §§ 13-1313, 13-1315.

ARGUMENT.

No Substantial Federal Question Is Presented.

This Court has already resolved the issue raised by the appellant. It has held that the furnishing by public school districts of free bus transportation to children attending religious schools, as part of a general program for pupils attending public schools, is not state support of religion. *Everson v. Board of Education*, 330 U. S. 1, 16-18 (1947). The Court, on the contrary, held that to deny those children, solely on the ground that they are enrolled in religious schools, protection against "the serious danger of traffic accidents going to and from parochial schools" would constitute a denial to them of religious liberty. *Id.* at 16-18.

Appellant seeks to have this Court void Pennsylvania's six-year old program on the *sole* ground that that statute authorizes school districts to transport nonpublic school children (including those in religious schools) beyond district boundary lines. From this appellant argues (a) that "pupils attending nonprofit sectarian schools in Pennsylvania will receive greater benefits in the form of free transportation than their public school counterparts" (Jurisdictional Statement, 13) and (b) that therefore the program violates the Establishment Clause.

As to the first contention, the Supreme Court of Pennsylvania held that the statute confers *equal* benefits upon public and nonpublic school students:

> "The statute requires that nonpublic school students receive transportation opportunities 'identical' to those accorded public school students with the proviso that the district is not required to bus *any* student farther than ten miles from the district's borders. 'Identical' in this context means that public and nonpublic school

> students must be bused *to their schools* if such schools are within the ten mile limit. School district boundaries are not sacrosanct; they are only flexible political lines drawn to accommodate the efficient administration of the educational system of this Commonwealth. It was clearly within the power of the General Assembly to enact the ten mile proviso in Act 372." *Springfield School District*, — Pa. —, 397 A. 2d 1154, 1163 (1979).

As to appellant's second contention, the Supreme Court of Pennsylvania was correct in holding that this program created no violation of the Establishment Clause. Since busing outside a school district does not create any inequality or advantage in favor of any nonpublic school child (whether that child's school is sectarian or nonsectarian), it is the *religious* character of a school which appellant urges as the criterion for denying transportation benefits to children who, by reason of religion, attend out-of-district religious schools. Thereby appellant directly contradicts the teaching of this Court in *Everson*, that a state must not be prohibited "from extending its general state law benefits to all its citizens without regard to their religious belief." *Everson, supra*, at 16.

Appellant's reliance upon case authority to support its contentions is misplaced. *Luetkemeyer v. Kaufman*, 419 U. S. 888 (1974) involved a claim that the failure of Missouri to provide bus transportation for children attending religious schools violated their equal protection and free exercise rights. Missouri, unlike Pennsylvania, had not enacted a statute providing transportation for public and nonpublic school children generally. The case is not in point. *Wolman v. Walter*, 433 U. S. 229 (1977) which concerned, *inter alia*, entanglements arising out of the religious school administrator's controlling field trips by

bus, is not in point. Here the transportation is entirely under public control. *Americans United For Separation of Church and State v. Benton,* 413 F. Supp. 955 (S. D. Iowa, 1975) and *Members of the Jamestown School Committee v. Schmidt,* 427 F. Supp. 1338 (D. R. I., 1977) each involved statutes which confined public school pupils to transportation within their districts but provided for the transportation of nonpublic school pupils beyond district lines. The Iowa program reviewed in *Benton,* moreover, provided an economic penalty (in order to discourage competition among school districts) to the public school child who desired to attend school beyond the district line, whereas no such burden was placed on the nonpublic school child. The Rhode Island statute reviewed in *Schmidt* had the additional feature of being tied directly into church programs to consolidate, or regionalize, parochial schools, thus producing excessive church-state entanglements. None of the disqualifying features of the Iowa or Rhode Island programs are found in the Pennsylvania statute.

CONCLUSION.

It is respectfully submitted that this Court should dismiss this appeal for lack of a substantial federal question.

Respectfully submitted,

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Attorneys for Intervenor-Appellees.

May 31, 1979